No. 89-1499

IN THE

Supreme Court of the United States

October Term, 1989

A. F. PLAZZO
and
PLAZZO INSURANCE SERVICES, INC.,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE LIFE INSURANCE COMPANY,
NATIONWIDE GENERAL INSURANCE COMPANY,
and NATIONWIDE PROPERTY & CASUALTY COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

A. A Conflict Exists between the Fourth & Sixth Circuits.

Petitioners are gratified that the Respondents have acknowledged that the Fourth Circuit is **presently**[1] in conflict with the Sixth and D.C. Circuits. To resolve such a conflict was one of the reasons Petitioners invoked the jurisdiction of this court.

The question of whether the Darden standard is right or wrong should be reserved for **this court** upon the granting of this petition. After all, this case involves a controversy about an indefinite definition in a federal statute. The answer should be provided by the United States Supreme Court.

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[1]Under the doctrine of the law of the case, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation. 1B Moore's Federal Practice, ¶ 0.404[1] (1983 ed.). It seems, therefore, that Respondents' reliance upon the power of one panel of the Fourth Circuit to reverse another [such as the panel of Darden v. Nationwide Mutual Insurance Company, 796 F.2d 701 (4th Cir. 1986)] comes under the category of wishful thinking.

B. **A Conflict Also Exists, in Fact if not in Name, between the Sixth Circuit and the D.C. Circuit.**

Respondents have failed to acknowledge in their Brief, however, that the district court was reversed by a panel of the Sixth Circuit without any regard for the fact that the trial court had adopted and applied the common law analysis favored by the circuit for the District of Columbia. Appendix, 62-70. In Petitioners' view, the Sixth Circuit's categorizing of their status as "independent contractors" is, as a matter of law, **in conflict** not only with the result reached by the Holt court, but also with that circuit's rationale.[2] The term "employee," found in Section 3(6) of Title I of ERISA, ought not to be construed to exclude, as a

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[2]Compare Wolcott v. Nationwide Mutual Insurance Co., 884 F.2d 245 (6th Cir. 1989) with Holt v. Winpisinger, 811 F.2d 1532 (D.C. Cir. 1987). See also Plazzo v. Nationwide Mutual Insurance Co., No. 88-4016 slip op. (6th Cir., Dec. 22, 1989), rev'g, 697 F.Supp. 1437 (N.D. Ohio 1988) at Appendix, p. 81.

matter of law, an "independent contractor" unless there is an absence of control by the person for whom the services were performed. The terms are not mutually exclusive.

C. **A question of law or a question of fact.**

The Respondents offered Holt v. Winpisinger, 811 F.2d 1532, 1536 & nn.30, 31 (D.C. Cir. 1987) as the example of the principle of law used by the Sixth Circuit to justify reversals of the district courts in Plazzo and Wolcott:

> The ultimate characterization of an individual as an employee or as an independent contractor - the legal significance of the facts found by the trier of fact - is a question of law.

See Respondents' Brief, page 7.

Holt is a bad example. There was no "trier of fact" in Holt. Moreover, most courts would question Respondents' characterization of "the legal significance of the facts . . . is a question of law." The headnote in Bostic v. Connor (1988), 37

Ohio St.3d 144, a workers' compensation case decided by the Ohio Supreme Court, is instructive:

> Whether someone is an employee or an independent contractor is ordinarily an issue to be decided by the trier of fact. The key factual determination is who had the right to control the manner or means of doing the work.

Holt posed and answered the very same question, i.e. "who had the right to control the manner or means of doing the work?" Despite Respondents' claim to the contrary, a close examination of the decision in Holt reveals that it treated the question of Holt's employee status as one of fact rather than one of law.

If one compares the decision of the district court in Plazzo with the decision of the appellate court in Holt, he would find that the reasoning employed, as well as the result achieved, were identical.

Consider the following: Holt was a bookkeeper who had worked under the

supervision of the same manager for ten years. The first year, however, was under a contract which, for policy reasons, designated her as an independent contractor. Relying solely upon this written provision, the administrator of the retirement plan concluded that Holt had been an employee for only nine years. Accordingly, he held that her retirement benefits had not vested. The trial court adopted the administrator's decision. The appellate court reversed. In holding that the benefits had vested, the appellate court determined, as a fact, that which the plan administrator and the trial court chose to ignore - that Holt's supervisor had maintained control over her work during the **entire ten years** of her employment.

The district court in Plazzo employed the same rationale and reached the same result as was reached in Holt v. Winpisinger, Id. It also held that the designation of

independent contractor in the Agents Agreement was not dispositive of non-employee status. The district court weighed the evidence and found that Respondents exercised "pernicious control" over their agent, Plazzo, and that, under such conditions, he was entitled to the retirement benefits available to an employee under ERISA in the same way that such benefits were available to Holt. Plazzo, an insurance agent, had been trained and continuously supervised by the very same Nationwide District Sales Manager that had recruited him to sell insurance, exclusively for Nationwide, 22-1/2 years earlier. Plazzo was not an independent agent.[3] He was contractually limited to selling Respondents' insurance at

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[3]Of the 5,000 Nationwide career agents, none are members of the Independent Insurance Agents Association, an organization of independent insurance agents. They cannot be. Nationwide agents, sometimes called "captive agents," are rejected by that organization because of restrictions imposed by Nationwide in their Agents Agreement.

a commission rate set unilaterally by them.

Not only is the Sixth Circuit in conflict with the Fourth Circuit, but, having reversed the district court, it has produced a conflict with Holt v. Winpisinger, Id.

D. What Should the Standard Be to Determine Employee Status under ERISA?

Following a lengthy analysis of the question "whether A.F. Plazzo and his agency were 'employees' of Nationwide within the meaning of 29 U.S.C. §1002(6)" (Appendix, 47-62), the district court concluded that there was "no need or justification . . . to suggest that any meaning other than a common law definition [of 'employee'] was intended by Congress." Should this court conclude otherwise, the appropriate standard for determining "employee" status under ERISA ought to take into account the protective purposes of the statute.

In a quote attributed to him, Clarence Seward Darrow said, "[l]aws should be like

clothes. They should be made to fit the people they are meant to serve."[4]

This common sense view is supported by the rules of statutory construction, the legislative history, and the interpretations of the U.S. Department of Labor. Where the resolution of a question of federal law turns on the meaning of a statute and the intent of Congress, courts look first to the statutory language and then to legislative history if the statutory language is unclear. Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

Respondents have argued, in their Brief in Opposition, that the ERISA vesting requirements, as well as the tax and labor regulations that relate thereto, adopt the common law test of employee status. See Respondents' Brief, pages 7, 9-12. The

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[4]Bradley, Daniels & Jones, The International Dictionary of Thoughts (J.G. Ferguson Pub. Co. 1969) 429.

argument is both incomplete and misleading as will be disclosed by the response that follows.

E. The Legislative History Reflects that Congress Intended the Term "Employee" Be Construed Liberally.

The purposes of ERISA are explicitly set forth in 29 U.S.C. §1001.[5] Congress observed that the "growth in size, scope and numbers of employee benefits plans" has had a continuing impact on the "well-being and security of millions of employees and their dependents." 29 U.S.C. §1001(a). With the growth of employee benefit plans, Congress became concerned that "many employees with

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[5]The Fourth Circuit's view of statutory construction referred to in Darden is supported by the United States Supreme Court in C.I.R. v. Engle, 464 U.S. 206, 104 S.Ct. 597, 78 L.Ed.2d 597 (1984), where it said that the court's duty in interpreting statutory language is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.

long years of employment [were] losing anticipated retirement benefits owing to the lack of vesting provisions in such plans." 29 U.S.C. §1001(a).[6]

Courts have held that the general objective of ERISA was to increase the number of individuals in employer financed benefit plans and to assure that those participants

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[6]The comments of the House Committee on Ways and Means are particularly illuminating on the grave public policy concerns which prompted the legislation regulating pension plans:

> One of the most important matters of public policy facing the nation today is how to assure that individuals who have spent their careers in useful and socially productive work will have adequate incomes to meet their needs when they retire. This legislation is concerned with improving the fairness and effectiveness of qualified retirement plans in their vital role of providing retirement income.

H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News at 4676.

actually received benefits.[7] ERISA was the result of a congressional endeavor to insure that plan participants do not lose vested benefits because of arbitrary forfeiture provisions.

The legislative history of ERISA expressly provides that Congress intended as a matter of national policy that the Act be applied as expansively as possible. The

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[7]The Senate Committee on Finance stated, in broad outline, that ERISA was designed:

> (1) to increase the number of individuals participating in retirement plans;
>
> (2) to make sure that those who do participate in such plans do not lose their benefits as a result of unduly restrictive forfeiture provisions or failure of the plan to accumulate and retain sufficient funds to meet its obligations; and
>
> (3) to make the tax laws relating to such plans fairer by providing greater equality of treatment under such plans for the different taxpaying groups involved.

S.Rep. No. 93-383, 93d Cong. 1st Sess. (1973), reprinted in 1974 U.S. Code Cong. & Admin. news at 4890.

legislative history states:

> Generally, it would appear that the wider or more comprehensive the coverage, vesting, and funding, the more desirable it is from the standpoint of national policy.
>
> . . .
>
> One of the major objectives of the new legislation is to extend coverage under retirement plans more widely.

H.R. Rep. No. 93-807, supra at 4682 and S. Rep. No. 93-383, supra at 4904.

By adopting solely the technical common law analysis of "employee" status, ERISA's intended reach would be narrowed significantly. The statute ought not to be applied in a common law vacuum but should take into consideration the remedial purposes which Congress intended -- a view supported by the U.S. Department of labor.

F. The Labor Department Has Interpreted the Definition of "Employee" under ERISA Liberally In Light of the Protective Purposes of the Act.

If a court, in interpreting a statute, finds that Congress expressed a specific intent with respect to the issue at hand, the

court's inquiry stops there and that intent is enforced regardless of a contrary agency opinion. However, if the court finds that Congress' intent was not specifically expressed, an agency's interpretation should be accorded great deference and should be invalidated only if it is not a "reasonable accommodation" of conflicting policies which were committed to the agency's care by statute. Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Board, 804 F.2d 1059 8th Cir. (1986) at p. 1063.[8] The U.S. Department of Labor ("Labor"), the federal agency vested with statutory authority to promulgate regulations to carry out the provisions of ERISA, has taken the position that the term "employee" must be interpreted in light of

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[8]"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

the remedial purposes of the statute. Should this court find, during its search to determine Congress' intent, that the legislative history of ERISA is not conclusive, it could defer to Labor's interpretation.[9]

The Department of Labor[10] has opined that the term "employee," as used in the statute, should be interpreted liberally in

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[9]"If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation . . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron U.S.A. v. NRDC, 467 U.S. 837, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

[10]The authority of the Department of Labor to interpret the statute is explicitly granted in the statute itself. Under 29 U.S.C. §1135, the Secretary is authorized to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter [ERISA, Title I]." The "Secretary" is defined as the Secretary of Labor. 29 U.S.C. §1002(13).

light of the protective purposes of ERISA, and gone on to state:

> It is our interpretation that insurance agents whose business activity is predominantly with one life insurance company are 'employees' of that life insurance company within the definition set forth in §3(6) [29 U.S.C. §1002(6)] . . . . Where there exists a potential for abuse under an employee benefit plan, the Department intends to interpret the provisions of ERISA liberally in favor of plan participants and their beneficiaries, in order to protect their rights and benefits under the plan. For this reason, the definition of 'employee' as set forth in §3(6) [id.] of ERISA is interpreted broadly to include certain insurance agents who under common-law rules would not be deemed to be 'employees'. Congress has expressed its intent for broad interpretation of the coverage of ERISA to protect the interests of participants and their beneficiaries. Evidence of this intent is reflected by section 4(a) [29 U.S.C. §1003(a)] of ERISA which extends the jurisdiction of Title I provisions to participants of all employee benefit plans except those handfuls mentioned in section 4(b) [29 U.S.C. §1003(b)] (and those plans exempted from certain parts of Title I pursuant to sections 201, 301 and 401 of ERISA [29 U.S.C. §§1051, 1081, 1101]).

Furthermore, Department of Labor Opinion Letter 81-88A (July 9, 1981), citing Opinion

Letter 77-75A, notes that "the Department . . . intends to interpret the provision of ERISA liberally to protect the rights of plan participants and beneficiaries" and noted that insurance agents whose business activity is predominantly with one life insurance company are 'employees' of that life insurance company within the definition set forth in Section 3(6) of ERISA [29 U.S.C. §1002(6)].[11]

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[11]That the Department of Labor has not restricted the meaning of "employee" to a narrow definition derived from the common law is also evident from its regulations promulgated under ERISA. At 29 C.F.R. § 2510.3-3(c), the regulations specify which category of persons shall not be deemed employees for purposes of ERISA. They provide that "an individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and . . . a partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership." These specific exclusions under the definition of "employee" leave the definition quite broad -- much broader than the common law definition of "employee."

G. Congress Has Construed the Term "Employee" in Other Legislation Broadly.

Respondents cite Treasury Regulation §31.3121(d)-1(c)(1) for the proposition that common law rules should apply to the definition of "employee" under ERISA. However, the "definition" cited by Respondents is in fact just one part of a laundry list of classes of individuals regarded as "employees" by the Treasury Department for certain income tax purposes. While common law employees are one such class of individuals, other classes -- including full-time life insurance salesmen, are treated as employees under the regulations as well. Treas. Reg. §31.3121(d)-1(d).

Indeed, a careful examination of federal legislation in related areas reveals that, in general, Congress has consistently rejected limiting the definition of "employee" solely to its technical common law meaning. Similarly, the Internal Revenue

Code, 26 U.S.C. §1, et seq., for example, contains at least six definitions of "employee."[12] Most of these definitions are tailored to fit the definition contained in Chapter 21 of the Internal Revenue Code, 26 U.S.C. §§3121 et seq., the FICA provisions. There again the Code defines "employee" to include corporate officers, agent or commission drivers distributing produce, traveling salesmen, full-time life insurance salesmen, and others -- in addition to common law employees. 26 U.S.C. §3121(d). The class of persons deemed to be employees is much broader than that envisioned by the common law. Similarly, the Social Security

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[12]"Employee" is defined in 26 U.S.C. §1402(d), 3121(d), 3231(b), 3306(i), 3401(c), and 7701 (a)(20) of the Code. Three of these definitions explicitly rely on the FICA definition contained in 26 U.S.C. §3121(d). None of these definitions "adopts" the common law definition. Regulations promulgated under 26 U.S.C. §3401(c) (the withholding provisions), however, vary only slightly from the common law definition. See Treas. Reg. §31.3401(c)-1.

Act, 42 U.S.C. §301 et seq., repeats those individuals included as "employees" in the Internal Revenue Code. 42 U.S.C. §410(j). Such federal legislation expands the common law definition of "employee."

CONCLUSION

It is the business of the Supreme Court of the United States to resolve conflicts between the circuits; to construe federal law to carry out the intent of Congress; and, most importantly, to judicially clarify federal law, both substantively and procedurally, for the benefit of both the trial and the appellate courts. This case presents an opportunity for the Supreme Court of the United States to accomplish each of these objectives.

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